BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANET HINMAN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 233,220
PARSONS STATE HOSPITAL	)	& 256,266
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals the August 28, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant contends she is entitled to a substantially greater work disability for the injuries suffered on March 24, 1998, and May 2, 2000, while working for respondent. Claimant requested a 65 percent work disability based upon a 30.5 percent task loss and a 100 percent wage loss in Docket No. 256,266.

Respondent contends the 5 percent award in Docket No. 233,200 should be affirmed and that claimant should be denied any permanent partial general disability for the alleged injuries of May 2, 2000 in Docket No. 256,266. The Appeals Board (Board) heard oral argument on March 9, 2004.

APPEARANCES

Claimant appeared by her attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Phalen of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant suffered two accidental injuries while working for respondent as a housekeeper. On March 24, 1998, claimant was shoved from behind by a patient at respondent's hospital, striking her face on a cabinet and falling to the floor. Claimant suffered injuries to her mouth and her low back. She was taken to Labette County Medical Center emergency room, where she was treated and released, with follow up with Dr. Phil Bortmes. A bone scan was ordered, revealing a slight disc bulge at L5-S1. Claimant was subsequently treated by Dr. Lauri Behm and placed upon restrictions of working only four hours a day, increasing gradually to eight hours a day. Claimant ultimately returned to work, full duty, without restrictions, on July 10, 1998.

Claimant did, however, have complaints of ongoing pain and was treated by Dr. William Smith, who diagnosed degenerative disc disease with left sciatic pain, recommending additional physical therapy. She was also referred to Dr. David O. King, who treated claimant from May through November of 1999. She was again released without restriction, although claimant alleges prior to the second date of accident of May 2, 2000, she was never totally pain free.

On May 2, 2000, claimant was again attacked by the same client, who pushed her, this time while she was in a bathroom, cleaning a stool. Claimant was struck in the back, resulting in increased low back pain. Claimant sought immediate medical attention and was taken to Parsons, Kansas, where she was examined by Dr. Hulsman, who x-rayed her back. Dr. Hulsman read the low back x-rays as being unremarkable.

The next day, claimant returned to Dr. King, who diagnosed cervical sprain, a cerebral concussion, a lumbar sprain and anxiety. Psychiatric or psychological counseling was recommended for her anxiety. She was referred to psychologist John P. White, D.O., board certified in psychiatry and psychopharmacology. Dr. White treated claimant over a period of time, diagnosing posttraumatic stress disorder with severe anxiety symptoms. He last examined claimant on February 26, 2002, at which time she was having anxiety symptoms related to returning to work, but otherwise had stabilized. He opined that claimant would be unable to return to work with respondent. Claimant utilized Dr. White's medical opinion to obtain Social Security benefits. Once claimant obtained those Social

Security benefits, she simply ceased treatment with Dr. White, even though additional care and treatment had been recommended. Dr. White acknowledged that when a patient stops coming to him, it may be because they no longer feel they need his assistance. Additionally, he was informed that claimant had been looking for work, which, in his opinion, was an indication of improvement on her part. He also stated that if a person can go for six months without medication and without reoccurrence, then they are "out of the woods." At the time he last saw her in February of 2002, he had provided claimant approximately two months worth of medical prescriptions.

Claimant was examined at her attorney's request by board certified orthopedic surgeon Edward J. Prostic, M.D., on October 22, 2001. During the examination, claimant denied a history of prior back problems. Dr. Prostic diagnosed aggravated lumbar disc disease and rated claimant at 12 percent to the body as a whole based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He restricted claimant from lifting greater than 30 pounds occasionally or 10 pounds frequently or 5 pounds constantly, and recommended she avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling, and avoid more than minimal use of vibratory equipment or being in captive positions.

Dr. Prostic, when provided a task list created by vocational expert Karen Crist Terrill, opined claimant was incapable of performing seven of the twenty-one tasks on the list, for a 33.33 percent task loss. He acknowledged that claimant had denied any preexisting impairment and testified that she had a normal neurological examination except for the reports of decreased sensation in the left leg. This decrease in sensation was global, rather than dermatomal, indicating it did not follow a normal nerve pattern. Except for loss of motion, he found no objective findings that claimant had an orthopedic problem. On cross-examination, he admitted that if he utilized the DRE category under the AMA *Guides*, claimant would have a 5 percent impairment, rather than the 12 percent he assessed.

Claimant was examined at the request of respondent by Philip R. Mills, M.D., board certified in physical medicine and rehabilitation. This examination occurred on October 9, 2002. He diagnosed claimant with a sacroiliac strain with underlying degenerative disc disease, which he felt was permanent. He also found preexisting degenerative changes at L5 in the lumbar spine, which he stated were asymptomatic until March 24, 1998. He assessed claimant a Category III lumbosacral impairment of 10 percent to the body as a whole, of which he said 5 percent preexisted the March 24, 1998 accident, thereby resulting in an additional 5 percent impairment as a result of the March 24, 1998 accident. In reviewing the task list of Ms. Terrill, he originally stated that claimant had a task loss of 9.5 percent. However, on cross-examination, he modified his opinion to a 29 percent task loss, opining that claimant is unable to perform six of the twenty-one tasks listed.

Dr. Mills permanently restricted claimant, with lifting occasionally up to 30 pounds and frequently up to 20 pounds, with a maximum lift of 50 pounds. In addition, he felt that

claimant should not walk or stand frequently and, if sitting, should not be pushing or pulling frequently.

Claimant was examined on October 21, 2002, at respondent's request by Patrick L. Hughes, M.D., board certified in psychiatry. Dr. Hughes did not feel claimant had any psychiatric impairment resulting from her injuries with respondent. The psychological distresses suffered by claimant after the March 1998 and May 2000 injuries were temporary. He stated that they resolve with proper, vigorous pharmacotherapy. During his psychiatric interview of claimant, he noted that claimant could not identify the return of any major depression or posttraumatic stress disorder symptoms after stopping the medications, which had been provided through the treatment of Dr. White. Dr. Hughes found claimant to be symptom free, with his examination occurring approximately eight months after claimant last saw Dr. White.

Dr. Hughes testified that from a psychiatric standpoint, there was no reason to keep claimant from working and that her choice to not work was because she did not want to. He went on to state that claimant did not want to place herself in a position where she might be assaulted again by a patient, such as occurred at respondent's facility on two occasions. His medical history indicated that claimant had been offered a return-to-work job at Parsons State Hospital, but that claimant had declined that opportunity. There was no indication when this alleged offer took place.

Dr. Hughes was somewhat critical of Dr. White's treatment of claimant, finding that Dr. White had not only sanctioned, but also perpetuated, claimant's disabled state. In Dr. Hughes' opinion, when claimant's symptoms became dormant, Dr. White should have released her to return to work.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[1]

Claimant suffered accidental injury on March 24, 1998, when she was attacked by a patient of respondent's. Dr. Mills opined claimant had an additional 5 percent impairment to the body as a whole. The Administrative Law Judge cited the medical opinion of Dr. Murati as supporting that 5 percent opinion. However, it is noted that there is no opinion in the record by Dr. Murati nor any indication that this claimant was ever examined or treated by Dr. Murati. Dr. Prostic, however, did examine claimant and, on cross-examination, admitted that if the AMA *Guides* DRE category were utilized, claimant would have a 5 percent impairment. The Board finds that claimant had a 5 percent impairment to the body as a whole as a result of the March 24, 1998 accident, thereby affirming the ultimate decision by the Administrative Law Judge.

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[1] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

With regard to the injuries suffered on May 2, 2000, the Board finds that claimant suffered additional accidental injury on that date as a result of the attacks upon her, which has rendered her incapable of returning to work for respondent.

In reviewing the task loss opinions in the record, the Board again notes the Administrative Law Judge mistakenly cited opinions by Dr. Murati on several occasions. As noted above, Dr. Murati was not involved in this litigation. However, Dr. Mills opined claimant had suffered a 29 percent loss of tasks when reviewing the task list provided by Ms. Terrill. Dr. Prostic also had the opportunity to review the task list provided by Ms. Terrill, finding claimant had a 33.33 percent task loss. The Administrative Law Judge determined that claimant suffered a 30.5 percent task loss when comparing the two opinions. The Board assumes that the Administrative Law Judge confused the opinion of Dr. Prostic, mistakenly utilizing the name of Dr. Murati instead. The Board finds that the Administrative Law Judge did render an accurate mathematical decision regarding what, if any, task loss claimant suffered in this matter and affirms same.

Respondent alleges claimant failed to make a good faith effort to find employment, as, rather than returning to work, claimant obtained Social Security benefits and simply ceased any attempts at reemployment. Respondent was also critical of claimant's apparent use of Dr. White in this matter, as once claimant obtained her Social Security benefits, she ceased going to Dr. White altogether, even though additional treatment had been contemplated. The Board finds claimant is not totally disabled and has the ability to engage in substantial gainful employment. Nevertheless, claimant has failed to put forth a good faith effort to obtain employment. Under K.S.A. 1999 Supp. 44-510e, this obligates that the fact finder determine what, if any, appropriate post-injury wage should be utilized in computing claimant's permanent partial general disability.[2] The Board finds that claimant does have the ability to work in the open labor market. There was no wage-earning opinion in the record. Therefore, given claimant's physical restrictions, utilizing a minimum wage would be appropriate. This results in a 30 percent wage loss. The Board, therefore, adopts the Administrative Law Judge's finding that, in combining both wage loss and task loss, claimant has a 30.25 percent permanent partial general disability.

Finally, the Administrative Law Judge granted respondent a 5 percent credit, under K.S.A. 1999 Supp. 44-501(c), for the impairment awarded in Docket No. 233,220. The Board finds that claimant's preexisting condition justifies a reduction in the amount of compensation awarded under K.S.A. 1999 Supp. 44-501(c). Therefore, the finding by the Administrative Law Judge that claimant has a 25.5 percent permanent partial general disability as a result of the injuries suffered on May 2, 2000, is affirmed.

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[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated August 28, 2003, awarding claimant a 5 percent impairment to the body as a whole, in Docket No. 233,220, and a 25.5 percent permanent partial general disability, in Docket No. 256,266, should be, and is hereby, affirmed.

With the exception of the clarification of the Administrative Law Judge's citing of Dr. Murati in the record, the remainder of the Award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
William L. Phalen, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director